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**UNITED STATES DISTRICT COURT**

**NORTHERN DISTRICT OF CALIFORNIA**

**SAN FRANCISCO DIVISION**

MARY KATHERINE ARCELL, *et al.*,

Plaintiffs,

v.

GOOGLE LLC, ALPHABET INC., XXVI HOLDINGS INC., APPLE INC., TIM COOK, SUNDAR PICHAI, and ERIC SCHMIDT,

Defendants.

CASE NO. 3:22-cv-02499-RFL

**DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR RELIEF FROM ORDER OF DISMISSAL PURSUANT TO FRCP 60(b) AMENDING THE ORDER AND GRANTING LEAVE TO FILE AN AMENDED COMPLAINT**

Date: June 18, 2024
Time: 10:00 a.m.
Place: Courtroom 15—18th Floor
Judge: Hon. Rita F. Lin

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## I. INTRODUCTION

Between this case and the highly analogous *Crane* action, Plaintiffs and their counsel have attempted to state a claim across *six* complaints, which four judges in this District have rejected. Plaintiffs' motion for relief from the Court's February 5, 2024 Order ("Motion") is a meritless attempt to burden Defendants and this Court yet again. It should be denied.

Plaintiffs' Motion rests on supposed "newly discovered evidence" that could not have saved their inadequately pled horizontal conspiracy claims in their First Amended Complaint ("FAC"), ECF No. 67. Plaintiffs' "evidence" principally consists of two documents that detail Apple's and Google's obligations under their *vertical* commercial search relationship: the 2014 Joint Cooperation Agreement ("2014 JCA") and the 2016 Amendment to the Information Services Agreement ("2016 ISA"). Both documents underscore what Defendants have argued all along and what the Court has ruled. They show that Apple agreed to pre-set Google Search as the default general search engine in its Safari web browser, while Google agreed to provide Apple with a share of the advertising revenue it generates from searches in Safari. None of the documents' terms establish or even suggest a *per se* unlawful horizontal agreement not to compete. Meanwhile, Plaintiffs still cannot provide any plausible allegations that Apple ever entered or intended to enter the general search market; indeed, the "new" trial testimony that Plaintiffs cite undermines that theory. Plaintiffs' "newly discovered evidence" thus leaves Plaintiffs in the same position they were in when the Court dismissed the FAC—able only to plead a vertical relationship between Apple and Google consistent with their rational, lawful economic self-interest. *See Arcell v. Google LLC* ("*Arcell II*"), 2024 WL 1090009, at *2 (N.D. Cal. Feb. 5, 2024). Further amendment would simply yield a further dismissal.

Plaintiffs' Motion fails for the additional reason that the "newly discovered evidence" that Plaintiffs invoke is not new at all. Defendants have acknowledged Apple and Google's vertical agreements from the start of this case. The 2014 JCA and the 2016 ISA were also admitted as exhibits in last year's highly publicized *U.S. v. Google* trial in Washington, D.C.—a litigation that Plaintiffs have referenced throughout this case and in which, as the court in *Crane* observed, "the government is not pursuing and has never pursued any Section 1 claim involving an unlawful conspiracy between Google and Apple." *Cal. Crane Sch., Inc. v. Google LLC* ("*Crane II*"), 2024

WL 1221964, at *7 n.9 (N.D. Cal. Mar. 21, 2024). The U.S. Department of Justice ("DOJ") posted both exhibits publicly in *November 2023* on its website (where Plaintiffs ultimately retrieved them), and the trial transcripts Plaintiffs cite have been available from a court reporter since at least that time. Yet Plaintiffs did not alert the Court to this "evidence" until almost six months later, and over three months after the Court dismissed their conspiracy claims with prejudice. Plaintiffs thus fail to show, as they must, that they exercised diligence in seeking to uncover this "evidence" and that they could not have discovered it earlier despite that diligence.

For all these reasons, Plaintiffs' Motion should be denied.

## II. BACKGROUND

Plaintiffs commenced this action on April 22, 2022, alleging that Apple and Google violated Sections 1 and 2 of the Sherman Act by engaging in a *per se* unlawful horizontal conspiracy not to compete in the "search business." Compl., ECF No. 1. Plaintiffs offered no plausible allegations to support this farfetched claim. Instead, they sought to show an unlawful agreement from (1) publicly known vertical agreements whereby Apple agreed to set Google as the default search engine in Safari, and Google agreed to pay Apple a share of the advertising revenues generated by searches performed on Google by Safari users, *id.* ¶¶ 88–94, and (2) supposedly "secret meetings" between Apple and Google executives related to those agreements, *id.* ¶¶ 8, 11, 13, 100, 102, 121–25.

Defendants filed their first motion to dismiss on June 24, 2022, ECF No. 25, acknowledging their vertical agreements on the very first page. They explained:

> Pursuant to publicly reported agreements, known as Information Services Agreements, Apple [] agreed to set Google as the default search provider in its Safari web browser in the United States because Google offers the highest quality search results. . . . Google [] agreed to pay Apple a share of the advertising revenues generated by searches performed on Google by Safari users . . . .

*Id.* at 1. "Unsurprisingly," Defendants noted, "Apple and Google executives [] met numerous times over the years as part of the ongoing working relationship created by these agreements." *Id.* at 4. Plaintiffs failed to spin that lawful, ongoing vertical relationship into a horizontal conspiracy.

Judge Davila agreed, concluding that Plaintiffs failed to plead direct or circumstantial evidence of a horizontal conspiracy. *Arcell v. Google LLC* ("*Arcell I*"), 2023 WL 5336865, at *3–4 (N.D. Cal. Aug. 18, 2023). Plaintiffs' "conclusory allegations of an agreement for Apple not to

develop its own search engine" did not establish direct evidence of a conspiracy, *id.* at *3, and Plaintiffs' allegations of "secret meetings" did not establish circumstantial evidence of a conspiracy because they "could just as easily suggest rational, legal business behaviors as . . . an illegal conspiracy." *Id.* at 4. Judge Davila further ruled that Plaintiffs failed to "plead an actionable antitrust injury," *id.* at *5, and that Plaintiffs' Section 2 conspiracy-to-monopolize claim independently failed because it was not supported by allegations of a "specific intent" to monopolize. *Id.* at *4 & n.1.

Plaintiffs filed their FAC on September 18, 2023, ECF No. 67, adding Sherman Act Section 2 monopolization claims against Google only based on alleged exclusive dealing, as well as state law claims based on their Sherman Act claims. But they did nothing to remedy the defects that Judge Davila identified. Defendants filed another motion to dismiss on October 16, 2023. ECF No. 70.

While that motion to dismiss was pending, but prior to oral argument, a trial was held in *U.S. v. Google* from September to November 2023. The trial garnered considerable press attention.[1] And the 2014 JCA and 2016 ISA that Plaintiffs cite here were used with witnesses in open court. DOJ ultimately posted those documents on its website on November 17, 2023. Notably, DOJ's decision to post trial exhibits publicly on its website was itself the subject of press attention.[2]

Plaintiffs have been aware all along of *U.S. v. Google*, having seemingly brought this case based on an implausible contortion of that case and referencing it frequently thereafter. To provide a few examples: Plaintiffs (1) referenced Google's *U.S. v. Google* answer in joint case management statements, *see* ECF Nos. 33, 53, 78; (2) filed a statement of recent decision regarding the *U.S. v. Google* summary judgment decision, ECF No. 72, which the Court considered, *see* ECF No. 82; Jan. 23, 2024 Hearing Tr. 13:12–15, ECF No. 91; and (3) sought leave to file a sur-reply in part to address that decision, *see* ECF No. 80, despite previously referencing the decision in their FAC, *see* FAC

[1] *See, e.g.*, Miles Kruppa, *Google's Antitrust Trial to Set 'Future of the Internet,' DOJ Says*, Wall St. J. (Sept. 12, 2023), https://www.wsj.com/tech/googles-antitrust-trial-gets-under-way-in-washington-de1725b6; Nico Grant & David McCabe, *Google C.E.O. Says Tech Giant Has Improved the Web for All Consumers*, N.Y. Times (Oct. 30, 2023), https://www.nytimes.com/2023/10/30/technology/google-sundar-pichai-antitrust-trial.html; Nico Grant & David McCabe, *What Google Argued to Defend Itself in Landmark Antitrust Trial*, N.Y. Times (Nov. 14, 2023), https://www.nytimes.com/2023/11/14/technology/google-antitrust-trial-defense.html.

[2] *See, e.g.*, Sabrina Willmer, Emily Birnbaum, & Leah Nylen, *Google Judge Rules Trial Documents Can Be Posted by US Online*, Bloomberg (Sept. 26, 2023), https://www.bloomberg.com/news/articles/2023-09-26/google-judge-rules-trial-documents-can-be-posted-by-us-online.

¶¶ 98, 146–47, 180, 209, *and* their opposition to the then-pending motion to dismiss, *see* ECF No. 73 at 3, 11. Plaintiffs even raised the *U.S. v. Google* trial at oral argument on January 23, 2024, citing testimony from Microsoft CEO Satya Nadella multiple times, *see* Jan. 23, 2024 Hearing Tr. 13:20–24, 15:9–13, 20:15–18—including in response to the Court's question as to whether Plaintiffs "could [] allege more now that [they] have [] information from the case in D.C.," *see id.* at 15:4–6.

On February 5, 2024, about two-and-a-half months after the presentation of evidence concluded in *U.S. v. Google*, this Court dismissed Plaintiffs' claims once more. This time, the Court dismissed Plaintiffs' conspiracy claims with prejudice, *Arcell II*, 2024 WL 1090009, at *3, marking the third of four times a court has concluded that Plaintiffs' counsel failed to plausibly allege a non-compete conspiracy, *see id.* at *1–3; *Arcell I*, 2023 WL 5336865, at *3–4; *Cal. Crane Sch., Inc. v. Google LLC* ("*Crane I*"), 2023 WL 2769096, at *5–6 (N.D. Cal. Mar. 31, 2023); *Crane II*, 2024 WL 1221964, at *6–8. In this instance, the Court again declined to infer a conspiracy from Plaintiffs' allegations of "[m]eetings between [Defendants'] executives" because those allegations were "'fully consistent' with 'rational, legal business behavior'" given Defendants' "ongoing vertical business relationship." *Arcell II*, 2024 WL 1090009, at *2 (citation omitted). The Court also explained that Plaintiffs "offer[ed] no plausible allegations regarding Apple's plans to enter the search market," as their allegation "that Apple '[i]n the past' had been developing its own search engine [was] wholly conclusory and speculative," while their "allegation 'that as late as 2014 Apple had been working on its own search engine' undermine[d] the plausibility of [their] core theory that Apple had agreed with Google not to do so since at least 2005." *Id.* (second alteration in original) (quoting FAC ¶¶ 108, 112, 131). And the Court concluded (again) that Plaintiffs failed to plead an antitrust injury and declined to exercise supplemental jurisdiction over Plaintiffs' state law claims. *Id.* at *5. Finally, the Court dismissed Plaintiffs' exclusive dealing claims because Plaintiffs failed to adequately allege "substantial foreclosure," but it granted Plaintiffs leave to amend those claims because Plaintiffs "ha[d] not previously . . . test[ed] the[ir] adequacy." *Id.*

Plaintiffs filed a second amended complaint ("SAC") on March 6, 2024, advancing monopolization and attempted monopolization claims against only Google LLC, Mr. Schmidt, and Mr. Pichai ("Google Defendants") based on alleged exclusive dealing. *See* ECF No. 95. The SAC

references multiple witnesses' testimony from throughout the *U.S. v. Google* trial. SAC ¶¶ 36, 210–26. Because Plaintiffs did not name Apple or Mr. Cook as defendants in the SAC, Apple and Mr. Cook filed a motion to dismiss the case against them with prejudice. *See* ECF No. 96. The Google Defendants filed another motion to dismiss as well. ECF No. 97. In responding to Apple and Mr. Cook's motion to dismiss, on April 1, 2024, Plaintiffs previewed that they intended to "file a motion to set aside the Court's ruling" dismissing their conspiracy claims "on the same date that Plaintiffs [were] due to file their opposition to the pending Motion to Dismiss filed by Google" (i.e., on April 10, 2024). *See* ECF No. 98 at 3–4. Plaintiffs filed no such motion at that time. On April 23, the Court dismissed Plaintiffs' claims against Apple and Mr. Cook with prejudice. ECF No. 104.

Now over a month later, Plaintiffs seek to re-open their horizontal conspiracy claims based on so-called "newly discovered evidence." This evidence, from the *U.S. v. Google* trial, consists of two documents that amended the Information Services Agreement that governs Apple and Google's commercial search relationship (the 2014 JCA and the 2016 ISA), an internal Google email, and trial testimony. Mot. 2–3; Decl. of Joseph M. Alioto in Support of Plaintiff's Mot. ("Alioto Decl.") ¶¶ 10–19, ECF No. 106.[3] These materials merely set out precisely what Apple and Google have acknowledged here all along—vertical agreements whereby Apple agreed to set Google as the default general search engine in its Safari web browser, and Google agreed to provide Apple a share of its advertising revenue generated from searches on Safari. Nothing in these materials evidences a secret, additional *horizontal* agreement not to compete. In fact, they reveal that Apple had *independently* "chosen not to" develop its own general search engine "to this point" and viewed building a search engine as "a major undertaking with lots of implications." Alioto Decl. Ex. J at 2247:17–21.

## III. LEGAL STANDARD

The movant bears the "burden to establish a basis for reconsideration under" Federal Rule of Civil Procedure 60(b). *Yould v. Barnard*, 2018 WL 4300523, at *2 (N.D. Cal. Sept. 10, 2018). Relief is warranted only in "extraordinary or highly unusual circumstances," which is a "high hurdle[]" to

[3] The trial testimony Plaintiffs cite includes testimony from Google executives Sundar Pichai and Benedict Gomes, Apple executives Eddy Cue and John Giannandrea, Microsoft CEO Satya Nadella, and Google experts Dr. Kevin Murphy and Dr. Mark Israel. Alioto Decl. ¶¶ 10–19.

clear. *Sanai v. Kozinski*, 2021 WL 2383333, at *3 (N.D. Cal. June 10, 2021). To obtain relief based on "newly discovered evidence," plaintiffs must meet several requirements, two of which bear emphasis here. ***First***, plaintiffs must show that the evidence "was of such magnitude that [it] . . . would have been likely to change the disposition." *United States v. Shearer*, 2023 WL 5155807, at *2 (E.D. Cal. July 21, 2023) (citation omitted). And ***second***, they must show that they "'exercised due diligence' in discovering the evidence," *Abbywho, Inc. v. Interscope Recs.*, 2008 WL 11406034, at *5 (C.D. Cal. Jan. 7, 2008) (quoting *Coastal Transfer Co. v. Toyota Motor Sales, U.S.A.*, 833 F.2d 208, 211 (9th Cir. 1987)), and that the evidence "could not have been discovered [earlier] through the exercise of [that] diligence," *Shearer*, 2023 WL 5155807, at *2 (citation omitted).

## IV. ARGUMENT

Plaintiffs are not entitled to the extraordinary relief they seek. As set forth below, Plaintiffs fail to show that: (1) the evidence would likely have changed the outcome of Defendants' motion to dismiss; and (2) they exercised due diligence in uncovering the evidence, and the evidence could not be discovered earlier through that diligence. Either of these grounds is sufficient to deny the Motion.

### A. Plaintiffs Fail to Show that the Evidence Would Likely Have Changed the Outcome of Defendants' Motion to Dismiss

Plaintiffs fall far short of showing that the supposed "newly discovered evidence" is "of such magnitude that production of it earlier would have been likely to change the disposition of the case." *Coastal Transfer Co.*, 833 F.2d at 211. Plaintiffs' "evidence" details Apple and Google's *vertical* agreement and does not provide direct or circumstantial evidence of an additional *horizontal* non-compete agreement. It thus supports what Defendants have said all along and what the Court ultimately ruled: The existence of a revenue-sharing agreement and meetings between Apple and Google's executives do not plausibly suggest a conspiracy because they are consistent with a rational, *vertical* business arrangement that is not *per se* unlawful. The "evidence" also does nothing to cure Plaintiffs' lack of antitrust standing or failure to plead that Apple specifically intended for Google to monopolize any market. Nor does it give the Court reason to revisit Plaintiffs' state law claims.

### 1. The Documents that Plaintiffs Attached to their Motion Do Not Provide Direct or Circumstantial Evidence of a *Per Se* Unlawful Horizontal Conspiracy

The materials that Plaintiffs attached to their Motion provide no support for their contention that Apple and Google entered into a *per se* unlawful agreement not to compete in general search. In a desperate effort to show a plausible conspiracy, Plaintiffs highlight portions of the 2014 JCA and 2016 ISA that (1) require Apple to "offer Google the opportunity to supply [] ads or paid listings" in Siri or Spotlight should Apple ever decide to "include[] ads or paid listings in Siri or Spotlight," *id.* at 5–8; (2) govern Apple and Google's revenue sharing obligations pursuant to their search relationship, *id.*; (3) provide for an annual "Check-In" between Apple and Google's CEOs, *id.* at 3–4; and (4) detail Apple's obligation to pre-set Google Search as the default general search engine in its Safari web browser, *id.* at 10–12. Plaintiffs also cite Apple testimony from the *U.S. v. Google* trial to try once more to cast Apple and Google as potential horizontal competitors. Mot. 8–10. None of these materials evinces a horizontal conspiracy, and if anything they undermine Plaintiffs' theory.

To start, the provisions of the 2014 JCA and the 2016 ISA on which Plaintiffs rely do not evidence a horizontal conspiracy not to compete. ***First***, Plaintiffs aver that a provision in the 2016 ISA requiring Apple to "offer Google the opportunity to supply [] ads or paid listings" in Siri or Spotlight, should Apple decide to "include[] ads or paid listings in Siri or Spotlight," amounts to the *per se* unlawful horizontal "agreement not to compete" they have claimed from the start of this case. Mot. 5–6. Not so. Siri and Spotlight *are not* general search engines like Google Search, and Plaintiffs have never alleged otherwise. They are features on Apple devices that Plaintiffs concede act as "search access" points, FAC ¶ 106, and principally help users answer simple questions and navigate and perform tasks on their devices. As the FAC noted, Siri is "Apple's voice-activated assistant," and Spotlight is "Apple's system-wide search feature." *Id.* Plaintiffs offer no allegations that Apple ever had the ability, intention, or incentive to run search ads or paid listings in Siri or Spotlight. Nor do they allege that Apple ever had the ability, intention, or incentive to acquire or build its own search advertising technology, which would be a complex and expensive endeavor. Such allegations would be irrelevant anyway given that Plaintiffs are alleged general search *users* alleging a conspiracy in the *general search* market, not the *search advertising* market. FAC ¶¶ 162–

65. The fact that Apple agreed to offer Google ads or listings on its search access points does not suggest that Apple agreed to forgo prior plans to compete with Google in general search.

***Second***, Plaintiffs claim that the 2016 ISA's revenue-sharing provision evidences a horizontal conspiracy because it shows "unlawful revenue sharing [] between potential competitors." Mot. 6–7. Wrong again. Apple and Google have acknowledged this revenue-sharing provision all along, and all it evidences is a vertical relationship. As the Court ruled, Apple and Google's "ongoing vertical business relationship" is "fully consistent" with "rational, legal business behavior." *Arcell II*, 2024 WL 1090009, at *2 (citation omitted); *see also Crane II*, 2024 WL 1221964, at *7 (explaining that the revenue-sharing agreement evidences a "mutually beneficial relationship [that] could just as easily suggest rational unilateral behavior by both companies . . . [as] an unlawful conspiracy"). Nothing in the revenue-sharing provision on which Plaintiffs rely affects that conclusion.

***Third***, Plaintiffs claim that a 2016 ISA provision that "provides for an Annual CEO 'Check-In'" between Apple and Google's CEOs evidences their "involve[ment] in enforcing [] illegal agreements." Mot. 3–4. The Court has now twice considered and rejected the argument that such meetings evidence a horizontal conspiracy, explaining that they were "fully consistent" with "rational, legal business behavior." *Arcell II*, 2024 WL 1090009, at *2 (citations omitted); *see also Arcell I*, 2023 WL 5336865, at *4 (explaining that allegations of "meetings" could "just as easily suggest rational, legal business behaviors as . . . an illegal conspiracy"). Plaintiffs provide no reason why the Court should deviate from this conclusion. It is rational that to maintain a successful and legal commercial relationship, two companies would meet with one another "to review and discuss in good faith the performance of" their agreement, "to confirm . . . [their] compliance with the terms of" their agreement, and to discuss "the revenue performance of each party" under their agreement. Mot. 4 (internal quotation marks and emphasis omitted). The "Check-In" provision of the 2016 ISA reflects nothing more than that, and is not itself evidence of a horizontal conspiracy.

***Fourth***, Plaintiffs appear to suggest that the provision in the 2016 ISA obligating Apple to pre-set Google Search as Safari's default search engine evidences monopolization and/or attempted monopolization under Section 2 of the Sherman Act. Mot. 10–12. Wrong. The Court dismissed

Plaintiffs' monopolization and attempted monopolization claims against Google based on alleged exclusive dealing in part due to Plaintiffs' failure to plausibly allege "substantial foreclosure"—i.e., to provide plausible allegations that "the exclusive dealing arrangements" at issue "ha[d] some appreciable impact on the market," *Arcell II*, 2024 WL 1090009, at *3–4 (quoting *Eastman v. Quest Diagnostics Inc.*, 724 F. App'x 556, 558 (9th Cir. 2018)). The default provision says nothing as to whether Apple and Google's search relationship has had an impact on the market, so the language of this provision would not have had any impact on the disposition of the FAC. Moreover, it is unclear why Plaintiffs even raise this provision as a purported basis for their Motion, as their monopolization and attempted monopolization claims remain ongoing against the Google Defendants, and Plaintiffs even note that their Motion seeks reconsideration of the Court's ruling only as to their "first theory . . . that Apple and Google allegedly entered into a secret horizontal agreement." Mot. 3 (citation omitted).

Plaintiffs' attempt to paint Apple and Google as potential horizontal competitors with *U.S. v. Google* trial testimony likewise falls flat. Even with this testimony, Plaintiffs still "offer no plausible allegations regarding Apple's plans to enter the search market." *Arcell II*, 2024 WL 1090009, at *2. Plaintiffs argue that Eddy Cue, Apple's "lead negotiator" for the ISA, "testified . . . that, if Apple had not received the massive payments it sought from Google, Apple would have developed its own search engine." Mot. 8. That is incorrect and misleading. Responding to a hypothetical question asking what would have happened if Apple was "unable to reach a deal" on the ISA with Google, Mr. Cue "*speculate[d]*" that Apple may "have been left with no other choice than *potentially* building [its] own" but that this was "*not something [Apple] went off and investigated*." Alioto Decl. Ex. D at 2540:15–25 (emphasis added). This testimony, admittedly speculative, offers nothing to suggest that the ISA was the product of any horizontal agreement, or meeting of the minds between Google and Apple not to compete. Indeed, Mr. Cue's unequivocal testimony that Apple would rather "spend [its] resources" building other products and that partnering with Google has allowed Apple to "keep providing the best search results for [its] customers," while "continu[ing] to invest and innovate in the areas [it is] really good at," *id.* at 2541:1–2542:1, is precisely the kind of "rational unilateral behavior" that makes a conspiracy implausible, *see Crane II*, 2024 WL 1221964, at *7 ("Apple's

purported decision to abandon its search engine project . . . could just as easily be attributed to business factors, such as the actual and opportunity costs of developing a search engine[.]"). So, too, is testimony by John Giannandrea—Apple's head of AI and machine learning—that "Apple does not operate a general search engine," has independently "chosen not to" develop a general search engine "to this point," and views building a search engine as "a major undertaking with lots of implications." Alioto Decl. Ex. J at 2206:2–6, 2247:17–21. Plaintiffs' allegations that Apple "had been developing its own search engine" remain as "conclusory[,] speculative," and implausible as ever. *Arcell II*, 2024 WL 1090009, at *2.[4]

Ultimately, the materials Plaintiffs described in their Motion do not provide any inference of a horizontal conspiracy.[5] As this Court and three other judges in the Northern District of California have recognized, Apple and Google's vertical agreement cannot alone support the existence of a *per se* unlawful horizontal agreement. *See Arcell II*, 2024 WL 1090009, at *2; *see also Arcell I*, 2023 WL 5336865, at *3–4; *Crane I*, 2023 WL 2769096, at *5; *Crane II*, 2024 WL 1221964, at *6–7.

**2. Plaintiffs' Antitrust Claims Would Still Fail for Lack of Antitrust Standing and Failure to Plausibly Allege Apple's Specific Intent**

Even looking beyond Plaintiffs' failure to demonstrate that they could have plausibly pled a horizontal conspiracy had they incorporated their "new" evidence into the FAC, Plaintiffs would still fail to plead Sherman Act claims for two independent reasons: First, they still fail to allege that they have antitrust standing as to the claimed horizontal conspiracy. And second, they still fail to allege that Apple specifically intended for Google to monopolize any relevant market.

***Antitrust Standing.*** Plaintiffs still do not explain how they have standing under the antitrust

[4] Plaintiffs also rely heavily on the speculation of Google employees regarding Apple's ability to build a search engine and a request by Mr. Pichai to be made aware of employee departures to Apple. Mot. 8–9. Such speculation says nothing of Apple's plans or intentions to build a general search engine, and if anything, purported concerns by Google about such plans or intentions render implausible the notion that Apple and Google had a prior agreement not to compete in general search.

[5] To the extent Plaintiffs at all suggest that the "JCA and ISA" alone provide the "'who, what, when, where and how' of [their] allegations," Mot. 2, they are mistaken. Appending written agreements to a complaint does not state a conspiracy where, as here, the agreements are not themselves direct or circumstantial evidence that the parties partook in unlawful conduct. *See, e.g.*, *Toscano v. PGA Tour, Inc.*, 70 F. Supp. 2d 1109, 1114–15 (E.D. Cal. 1999) ("[T]he existence of a contract . . . does not, without more, give rise to an inference of concerted action under § 1."); *Mylan Pharms. v. Celgene Corp.*, 2014 WL 12810322, at *8 (D.N.J. Dec. 23, 2014) ("[T]here is no agreement under § 1 'when a party has simply entered into a permissible contract with the defendant[.]'" (citation omitted)).

laws to challenge the claimed conspiracy. Private plaintiffs bringing antitrust suits must establish "antitrust injury"—a "necessary, but not always sufficient," condition for showing antitrust standing, *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 110 n.5 (1986), that requires a plaintiff to "allege [a] credible injury caused by [alleged] unlawful conduct" that "flows from that which makes the conduct unlawful," *Somers v. Apple, Inc.*, 729 F.3d 953, 963 (9th Cir. 2013) (citation omitted), and that occurred "in the [same] market where competition is allegedly being restrained," *Crane I*, 2023 WL 2769096, at *3 (quoting *FTC v. Qualcomm Inc.*, 969 F.3d 974, 992 (9th Cir. 2020)). The Court previously concluded that Plaintiffs failed to show an antitrust injury as to their conspiracy claims because they did not plausibly allege "that Defendants entered into an illegal horizontal agreement," *Arcell II*, 2024 WL 1090009, at *5, the injuries they alleged were "vague and conclusory," and their theory of "injur[y] rel[ied] on a highly attenuated causal chain," *Arcell I*, 2023 WL 5336865, at *5.

The injuries that Plaintiffs claim from the alleged horizontal agreement remain as vague, conclusory, and attenuated as before. Plaintiffs' Motion merely asserts that Plaintiffs have been injured by Google's supposed "monetization of [their] data" and by being "deprived of alternative search engines." Mot. 12–13. Not only is that theory deficient for reasons the Google Defendants explain in their pending motion to dismiss, *see* ECF No. 97 at 4–8, but it also fails because it still does not "draw[] any line between *[the] alleged agreement*" and these injuries. *Arcell I*, 2023 WL 5336865, at *5 (emphasis added). Plaintiffs could have been injured only if, but-for the supposed agreement not to compete, Apple would have (1) developed its own search technology comparable to Google Search; (2) launched a search engine product; (3) used its yet-to-be-developed search product as the default search provider on Apple devices; (4) captured a sizeable portion of a relevant search market; and (5) increased competition in such a way that forced Google and its competitors to, *inter alia*, "innovate," better safeguard privacy, and provide higher-quality search results. Such a "highly attenuated causal chain," as the Court has already explained, does not establish an antitrust injury. *Id.*; *see also Korea Kumho Petrochemical v. Flexsys Am. LP*, 2008 WL 686834, at *5 (N.D. Cal. Mar. 11, 2008) (declining to find antitrust injury where plaintiff did not allege a "cognizable injury proximately caused" by alleged misconduct).

Not only does Plaintiffs' "new" evidence not remedy the lack of antitrust injury, it

undermines it further by revealing a "mismatch between the market that was allegedly restrained and the market in which Plaintiff[s] [were] allegedly harmed." *Crane I*, 2023 WL 2769096, at *4. Plaintiffs now appear to claim that Apple and Google conspired to not compete in a *search advertising* market, citing a provision in which Apple granted Google the "opportunity to supply [] ads or paid listings" in Siri and Spotlight. Mot. 5–6. Yet Plaintiffs assert injury only in a separate *general search* market. "Parties whose injuries . . . are experienced in another market do not suffer antitrust injury." *Crane I*, 2023 WL 2769096, at *3 (quoting *Qualcomm*, 969 F.3d at 992).

***Specific Intent.*** Plaintiffs also still do not show how they would cure their failure to plead Apple's specific intent for purposes of their Section 2 conspiracy-to-monopolize claim. To plead such intent, a plaintiff must plausibly allege that the defendants intended to empower one of them with the power "to seize monopoly power by destroying or excluding competition within the relevant market." *Stanislaus Food Prods. Co. v. USS-POSCO Indus.*, 2011 WL 2678879, at *12 (E.D. Cal. July 7, 2011). The Court already ruled that Plaintiffs failed to plead facts "to establish [a] specific intent" by Apple and Mr. Cook to enable Google's monopolization of the market. *Arcell I*, 2023 WL 5336865, at *4 & n.1.[6] There is nothing in Plaintiffs' "new" evidence that affects that ruling.

**3. Plaintiffs Provide No Basis to Revive their State Law Claims**

The Court "decline[d] to exercise supplemental jurisdiction over [Plaintiffs'] state law claims" after dismissing their federal claims. *Arcell II*, 2024 WL 1090009, at *5. Because Plaintiffs filed their SAC without including any state law claims, such claims are waived. *See* ECF No. 104 (noting prior "warning [] that failure to meet the deadline to assert claims in a second amended complaint would result in 'dismissal with prejudice'" and dismissing claims against Apple and Mr. Cook (quoting ECF No. 94 at 10)); *see also Chubb Custom Ins. Co. v. Space Sys./Loral, Inc.*, 710 F.3d 946, 973 n.14 (9th Cir. 2013) (citing *Lacey v. Maricopa Cnty.*, 693 F.3d 896, 928 (9th Cir. 2012)); *LBF Travel Mgmt. Corp. v. Derosa*, 2022 WL 3588926, at *7 (S.D. Cal. Aug. 22, 2022) (collecting cases).

Plaintiffs otherwise provide no independent basis to revive their state law claims. Plaintiffs mention their state law claims only *once* in their Motion, merely asking the Court, without more, to

[6] While Defendants raised this argument in their motion to dismiss Plaintiffs' FAC, *see* ECF No. 70 at 11–12, the Court did not reach the argument in its February 5, 2024 Order.

permit them to replead their state law claims. Mot. 2. They cannot provide such a basis in any event, as they have conceded all along that their state law claims were premised on their federal law claims and, thus, fall with their federal law claims. *See* ECF No. 77 at 7. Because Plaintiffs fail to demonstrate that the supposed "new" evidence would likely have changed the Court's disposition as to their federal law claims, they fail to demonstrate that the evidence would likely change the Court's disposition as to their state law claims. *See Crane II*, 2024 WL 1221964 at *8–10.

**B. Plaintiffs Fail to Show that They Exercised Diligence to Uncover the Evidence and that the Evidence Could Not Have Been Discovered Earlier Through that Diligence**

Plaintiffs also independently fail to show (as they must) that they exercised diligence to uncover the materials they cite here and that those materials could not have been discovered before the Court's February 5, 2024 Order through such diligence. "[D]ue diligence assumes at least some level of deductive reasoning in an active effort to discover evidence based on the knowledge and information already possessed by the litigants." *HCC Life Ins. Co. v. Conroy*, 2018 WL 559135, at *2 (S.D. Cal. Jan. 23, 2018). Courts deny relief where a party "fail[s] to show that [it] exercised [such] diligence" in uncovering the evidence at issue—for example, by failing to "detail the nature and extent of [its] efforts to obtain" the evidence. *Abbywho*, 2008 WL 11406034, at *5. Courts likewise deny relief where a party "offers no reason why the [evidence] could not have been obtained prior to" the relevant order with such diligence. *Barber v. Hawai'i*, 42 F.3d 1185, 1198 (9th Cir. 1994); *see also, e.g., Defs. of Wildlife v. Bernal*, 204 F.3d 920, 929 (9th Cir. 2000).

Plaintiffs fail to meet their burden to show that they exercised diligence because they do not adduce evidence as to their efforts to uncover the materials or "as to why they . . . could not have uncovered the[] [materials] at an earlier date through a diligent search." *LNG Dev. Co. v. U.S. Army Corps of Eng'rs*, 2015 WL 13681013, at *3 (D. Or. Dec. 21, 2015). Plaintiffs' Motion and declaration do nothing more than complain about the Court's stay of discovery in this case. Mot. 14–15; Alioto Decl. ¶¶ 2–5. Outside of conceding that counsel "did not monitor the DOJ website during the course of the trial," Alioto Decl. ¶ 7, Plaintiffs' filings never explain the steps that Plaintiffs took to uncover the 2014 JCA or the 2016 ISA, nor state why these materials supposedly eluded Plaintiffs until now. Nor do Plaintiffs even attempt to attest that the other *U.S. v. Google* trial

exhibits and testimony on which they rely were in fact "newly discovered" after the Court's February 5, 2024 Order, an impossible task given that they characterized some of that evidence—the testimony of Satya Nadella, *see* Alioto Decl. Ex. E—at oral argument on January 23, 2024, *see* Jan. 23, 2024 Hearing Tr. 13:20–24, 15:9–13, 20:15–18. These failures are alone grounds to deny Plaintiffs' Motion. *See Doe v. City of Baton Rouge*, 2022 WL 2236355, at *2 (D. Or. June 22, 2022) (denying Rule 60(b) motion where plaintiff described "'newly discovered evidence' in the vaguest terms, without showing that it could not have been discovered earlier"); *Spitzer v. Aljoe*, 2016 WL 7188007, at *9 (N.D. Cal. Dec. 12, 2016) (denying Rule 60(b) motion where "[p]laintiffs did not explain why th[e] evidence [at issue] was unavailable to them before the Court issued its Orders").

Nor could Plaintiffs have met their burden to show that they exercised diligence in any event. The 2014 JCA and 2016 ISA were admitted as exhibits months ago in the highly publicized *U.S. v. Google* trial and were addressed by witnesses throughout. *See* Plaintiffs' Notice of Exhibits Admitted into Evidence in Bulk, *United States v. Google LLC*, No. 1:20-cv-03010-APM (D.D.C. Sept. 22, 2022), Ex. B, ECF No. 711-2 (listing "JX0024" and "JX0033" as "joint exhibits offered without objection"). The versions of the agreements that Plaintiffs cite were, as Plaintiffs concede, posted publicly to DOJ's website, *see* Alioto Decl. ¶¶ 10–11—on *November 17, 2023*,[7] approximately three months *before* the Court entered its Order. *See Sunburst Mins., LLC v. Emerald Copper Corp.*, 300 F. Supp. 3d 1056, 1063 (D. Ariz. 2018) (denying Rule 60(b) motion where movant could "not explain why it took three months" to uncover evidence). The remaining evidence Plaintiffs cite also became available before the trial ended in November 2023.[8] Plaintiffs seemingly filed this case to try to morph one aspect of the *U.S. v. Google* litigation into a farfetched conspiracy, and have frequently invoked that litigation throughout this case. *See supra* Section II. Such close reliance shows that Plaintiffs were monitoring that case and should have become aware of the

[7] Antitrust Div., *U.S. & Plaintiff States v. Google LLC [2020] – Trial Exhibits*, U.S. Dep't Just., https://www.justice.gov/atr/us-and-plaintiff-states-v-google-llc-2020-trial-exhibits (last updated Apr. 25, 2024) (listing JX0024 and JX0033 as "Posted" on "November 17, 2023"); *see also* ECF No. 100-1, Ex. D at 1 (same).

[8] The internal Google email Plaintiffs cite (UPX1092) was posted to DOJ's website on October 30, 2023. Antitrust Div., *supra* note 7. The trial transcripts Plaintiffs cite are dated before November 13, 2023 and were likewise posted publicly. *See* Alioto Decl. Exs. D–J (citing *U.S. v Google Antitrust Trial Transcripts*, Capitol F., https://thecapitolforum.com/google_antitrust_trial_2023/ (last visited May 26, 2024)).

evidence they cite by the time the trial ended in November 2023, at the latest. That is the bare minimum of what "due diligence" demands. *See HCC Life*, 2018 WL 559135, at *2. Yet all counsel did was selectively read press accounts of the trial "from time to time." Alioto Decl. ¶ 7. Plaintiffs cannot complain that evidence was "not previously available" where the record reflects that they "simply did not attempt to obtain" it. *Kealoha v. Aila*, 2020 WL 7212991, at *2 (D. Haw. Dec. 7, 2020).

Plaintiffs' delay in "uncovering" publicly available materials and bringing them to this Court's attention warrants denial. Plaintiffs could have alerted the Court to their "newly discovered evidence" well before it dismissed the conspiracy claims on February 5, 2024—for example, at oral argument on January 23, 2024, when they referenced some of the same trial testimony they cite here. *Compare* Jan. 23, 2024 Hearing Tr. Hearing Tr. 13:20–24, 15:9–13, 20:15–18, *with* Alioto Decl. Ex. E. They also could have at least tried to bring the materials to the Court's attention shortly after they filed their SAC, which also referenced some of the same trial testimony they cite here. *See* SAC ¶¶ 36, 210–26. Yet Plaintiffs delayed considerably to bring this evidence to the Court's attention, filing their Motion over three months after the dismissal, over two months after they filed their SAC, and over one month after the date on which they said they would file, *see* ECF No. 98 at 3–4, perhaps waiting to test the waters on Defendants' arguments opposing a similar motion in the *Crane* action, *see Cal. Crane Sch., Inc. v. Google LLC*, 5:21-cv-10001-PCP (N.D. Cal.), ECF Nos. 156, 160–61. Plaintiffs' Motion is just the latest instance of Plaintiffs' gamesmanship in bringing meritless (if not frivolous) requests to prolong this case and ramp up Defendants' litigation costs. *See* ECF No. 100 at 5–6 & n.5 (describing Plaintiffs' requests). The Court should not reward such tactics.

Plaintiffs' Motion should be denied. Not only have Plaintiffs completely failed to make the requisite showing of diligence in obtaining the publicly available evidence they cite in their Motion, but also even if they actually had made that showing, the evidence would still not have changed the outcome of their conspiracy claims.

## V. CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs' Motion.[9]

[9] Defendants do not believe a hearing is necessary for the Court to resolve the instant Motion.

DATED: May 28, 2024

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**SIGNATURE ATTESTATION**

Pursuant to Civil Local Rule 5-1(h)(3), I attest under penalty of perjury that concurrence in the filing of this document has been obtained from any other signatory to this document.

DATED: May 28, 2024

By: /s/ *Steven C. Sunshine*

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